

Issues: Group II Written Notice (leaving worksite without permission) and Suspension;  
Hearing Date: 03/31/09; Decision Issued: 04/01/09; Agency: DOC; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 9045; Outcome: No Relief – Agency Upheld In Full.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9045**

Hearing Date: March 31, 2009  
Decision Issued: April 1, 2009

**PROCEDURAL HISTORY**

On October 31, 2008, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for leaving the work site without permission.

On November 9, 2008, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On March 4, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 31, 2009, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employs Grievant as a Corrections Officer at one of its Facilities. The purpose of her position is to "[p]rovide security and supervision of adult offenders."<sup>1</sup> One of the conditions of employment of her position is:

Corrections Officers must be willing to work any shift and any post; and must be willing to work overtime, weekends and holidays.<sup>2</sup>

Grievant and Corrections Officer N had been friends for several years. They were roommates at the Academy during their training. On September 29, 2008, Grievant was working in the control booth and a supervisor instructed Corrections Officer N to relieve Grievant so that Grievant could assist in packing an inmate's property. Corrections Officer N felt that she was capable of packing the inmate's property and believed the supervisor had discounted her ability. Corrections Officer N complained to Grievant.

On October 3, 2008, Grievant was at muster and overheard Corrections Officer N speaking with another corrections officer. Corrections Officer N said, "Why did that bitch have to come back to work; it was so peaceful in the building without her." Grievant construed Corrections Officer N's statement to be calling Grievant a bitch. Grievant found this comment untrue and offensive. Grievant no longer wished to work

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<sup>1</sup> Agency Exhibit 3.

<sup>2</sup> Agency Exhibit 4.

with Corrections Officer N. Grievant reported her concerns to Agency managers but was not satisfied with the speed of the Agency's investigation.

On October 7, 2008, Grievant was assigned to work in housing unit 4. Corrections Officer N was also assigned to work in that housing unit. Grievant told the Major that she would not work in housing unit 4 because Corrections Officer N was working there. The Major told Grievant that Grievant could not dictate where she would work. Grievant told the Major that if she had to work in housing unit 4, she was leaving the Facility. After muster, Grievant approached the Captain and told the Captain that she was not going to work in housing unit 4. Grievant met with the Captain and Major and restated she would not work in housing unit 4. The Major told Grievant to report to housing unit 4. Grievant responded by leaving the Facility, getting into her vehicle, and leaving the Facility grounds.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."<sup>3</sup> Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."<sup>4</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>5</sup>

"[L]eaving the work site during working hours without permission" is a Group II offense. On October 7, 2008, Grievant was at work and had been instructed to assume a post in housing unit 4. Grievant left the Facility and the Facility grounds. Grievant was not authorized to leave the Facility. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for leaving the work site during working hours without permission. Upon the issuance of a Group II Written Notice, the Agency may suspend an employee for up to ten workdays. Accordingly, Grievant's suspension of five workdays must be upheld.

Grievant contends she had the right to refuse to be placed in housing unit 4 where Corrections Officer N was working because doing so was placing Grievant in a hostile work environment. The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer, on the basis of an individual's race, color, natural origin, age, sex, religion, disability, marital status or pregnancy. DHRM Policy 2.30 defines a hostile environment as:

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<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

A form of sexual harassment when a victim is subject to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.

Corrections Officer N's comment about Grievant was intended as an insult and not as sexual comments, etc. Placing Grievant on a post in housing unit 4 with Corrections Officer N would not constitute placing Grievant in a hostile work environment.

Placing Grievant in housing unit 4 to work along side of Corrections Officer N would have the effect of forcing Grievant to work along side of an employee Grievant did not like and did not wish to work with. Nothing in DHRM policy prohibits an Agency from forcing employees who may not like each other from working with each other. Grievant did not have the discretion to refuse the Agency's post assignment simply because she did not like working with another employee.

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..."<sup>6</sup> Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a five workday suspension is **upheld**.

## APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

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<sup>6</sup> *Va. Code § 2.2-3005.*

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director  
Department of Employment Dispute Resolution  
600 East Main St. STE 301  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>7</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.